

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Expanding Flexible Use of the 3.7 to 4.2 GHz Band)	GN Docket No. 18-122
)	
Petition for Rulemaking to Amend and Modernize Parts 25 and 101 of the Commission's Rules to Authorize and Facilitate the Deployment of Licensed Point-to-Multipoint Fixed Wireless Broadband Service in the 3.7-4.2 GHz Band)	RM-11791
)	
Fixed Wireless Communications Coalition, Inc., Request for Modified Coordination Procedures in Band Shared Between the Fixed Service and the Fixed Satellite Service)	RM-11778
)	

**OPPOSITION TO JOINT OBJECTION TO DISCLOSURE OF CONFIDENTIAL AND
HIGHLY CONFIDENTIAL INFORMATION**



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September 12, 2019

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I. INTRODUCTION & SUMMARY

ACA Connects—America's Communications Association ("ACA Connects") hereby files this opposition to the Joint Objection to ACA Connects Request for Documents ("Joint Objection") submitted by Intelsat, SES, Telesat Canada, and the C-Band Alliance ("CBA") (jointly, "Satellite Parties") in the above-captioned Federal

Communications Commission (“Commission”) proceeding.¹ The Joint Objection comes in response to ACA Connects’ submission of Acknowledgements of Confidentiality signed by ten individuals for the purpose of obtaining access to Confidential Information (“CI”) and Highly Confidential Information (“HCI”) filed in this proceeding.² The Satellite Parties contend that certain of these individuals, namely those employed by ACA Connects and those employed by ACA Connects consulting firm Cartesian, should be denied access to this information.³

The Joint Objection presents no evidence that would cast doubt on the eligibility of any of these individuals to gain access to CI or HCI under the terms of the Protective Order. On the contrary, the Joint Objection appears to be nothing more than a procedural maneuver intended to prevent or significantly delay an adverse party – one with a competing proposal that is enjoying a surge in support – from gaining access to data that the Commission itself has deemed important to the proceeding.

Nevertheless, ACA Connects has no interest in entering a protracted dispute over access to this data. Accordingly, in the interest of resolving the matter as expeditiously as possible, ACA Connects will continue to seek access at this time only for a subset of the individuals that submitted Acknowledgments of Confidentiality. As

¹ See Letter From Michele Farquhar et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 et al. (filed Sept. 4, 2019).

² See Letter From Brian Hurley, ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 et al. (filed Aug. 29, 2019) (“ACA Connects Aug. 29 Letter”). The letter was filed pursuant to the Commission’s Protective Order in the proceeding. See *Expanding Flexible Use of the 3.7-4.2 GHz Band* et al., GN Docket No. 18-122 et al., Protective Order, DA 19-822 (rel. Aug. 26, 2019).

³ See Joint Objection at 2-3. The Satellite Parties do not object to the Acknowledgements of Confidentiality submitted by Pantelis Michalopoulos and Georgios Leris of Steptoe & Johnson, ACA Connects’ outside law firm attorneys.

explained below, these individuals are amply qualified to gain access to the data, and ACA Connects requests that they be granted such access expeditiously.

In addition, ACA Connects calls upon the Commission to ensure that information that has been presented to “decision-making personnel” and is directed to the “merits or outcome” of this proceeding is properly submitted into the record. At a minimum, this information must include the “confidential and competitively sensitive information” that Intelsat and SES each “presented” to senior Commission staff on November 18, 2018.⁴ Such information can and should be made available for review under the Protective Order. Making it available will ensure that ACA Connects and other parties have a fair opportunity to assess and respond to the evidence upon which the Commission will “base its determinations” in the proceeding and will thereby help protect these determinations from legal challenge.⁵

II. ROSS LIEBERMAN AND THE UNDERSIGNED ARE “OUTSIDE COUNSEL OF RECORD” FOR PURPOSES OF THE PROTECTIVE ORDER AND THUS ELIGIBLE TO ACCESS CONFIDENTIAL DATA FILED IN THIS PROCEEDING

The Satellite Parties assert that “[i]t is unclear” whether Ross Lieberman and the undersigned are “Outside Counsel of Record” eligible to review HCI in the proceeding.⁶ In making this assertion, the Satellite Parties attempt to sow doubt where none exists.

As an initial matter, the Protective Order makes abundantly clear that, as licensed attorneys employed by ACA Connects, Ross Lieberman and the undersigned

⁴ See Letter from Michele Farquhar, Counsel to CBA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 et al. at 2 (dated Nov. 11, 2018) (“CBA November 11, 2018 *Ex Parte* Letter”); see also *id.* at Attachment B (identifying Commission staff that attended the meeting). The information at issue concerned “the intricate methods and tools each company will utilize to groom and repack existing customers out of the spectrum coordinated for mobile use.” See *id.* at 2.

⁵ See Protective Order at 1.

⁶ See Joint Objection at 2.

may qualify as “Outside Counsel of Record” or “Outside Counsel.” Though this usage of the phrase “outside counsel” is broader than colloquial usage, “Outside Counsel of Record” or “Outside Counsel” is defined in the Protective Order to include “attorney[s] *employed* by a non-commercial Participant in the proceeding.”⁷ ACA Connects is such a Participant.⁸

Ross Lieberman or the undersigned would fail to qualify as “Outside Counsel of Record” only to the extent either attorney is involved in “Competitive Decision-Making,” which is defined in the Protective Order as “a person’s activities, association, or relationship with any of his or her clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a business relationship with the Submitting Party or with a Third-Party Interest Holder.”⁹ Both attorneys have signed and submitted

⁷ See Protective Order at 2. The Commission’s Protective Orders at one time defined “Outside Counsel of Record” to include “attorney[s] representing a non-commercial Participant in [a] proceeding.” In 2015, in response to advocacy from ACA Connects, the Commission modified the definition of the term so that it now expressly includes “attorney[s] *employed* by a non-commercial Participant.” See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent To Assign or Transfer Control of Licenses and Authorizations*, Order, MB Docket No. 15-49, 30 FCC Rcd 10360 (2015) (emphasis added); see also Letter From Barbara Esbin, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-149 (filed Aug. 15, 2015). By modifying the definition in this way, the Commission made abundantly clear that “an ‘in-house’ attorney for a non-profit trade association representing commercial parties can meet the definition of an ‘Outside Counsel’.”).

⁸ The American Cable Association (“ACA”), d/b/a ACA Connects—America’s Communications Association, is incorporated in Pennsylvania as a 501(c)(6) nonprofit trade association. The primary objective and emphasis of the association is to advocate for the interests of its small and medium-sized independent communications provider members before Congress and federal agencies. ACA does not issue stock and is not publicly traded. ACA has no parent company, and no publicly held corporation pays more than 10% of its dues or possesses or exercises more than 10% of the voting control over ACA.

⁹ See Protective Order at 1-2; see also *id.* at 2 (“The term ‘Outside Counsel of Record’ includes *any* attorney employed by a non-commercial Participant in this proceeding, provided that such attorney is not involved in Competitive Decision-Making.”) (emphasis added).

Acknowledgements of Confidentiality, each attesting to the fact that the signer is not involved in Competitive Decision-Making.¹⁰ The Satellite Parties present no evidence to the contrary; they merely cite to an ACA Connects filing, signed by Mr. Lieberman, that advocates for the interests of ACA Connects' members in this proceeding. Such routine advocacy does not come close to establishing Mr. Lieberman's or the undersigned's involvement in Competitive Decision-Making, with respect to ACA Connects or any of its member companies.

To more fully alleviate the concerns of the satellite industry, and out of an abundance of caution, Mr. Lieberman and the undersigned have each provided declarations swearing to the fact that they are not engaged in Competitive Decision-Making. These declarations should remove any possible doubt that the two attorneys are entitled to access the information; ACA Connects requests that they be granted such access as promptly as possible.

III. NIKOS ANDRIKOIANNPOULOS IS AN "OUTSIDE CONSULTANT" FOR PURPOSES OF THE PROTECTIVE ORDER AND THUS ELIGIBLE TO ACCESS CONFIDENTIAL DATA FILED IN THIS PROCEEDING

The Satellite Parties further claim that they are "unable to ascertain" whether individuals employed as officers or consultants of Cartesian are eligible to gain access to CI and HCI in this proceeding.¹¹ In particular, the Satellite Parties contend that there are "serious questions" as to whether such individuals are involved in Competitive Decision-Making and thereby ineligible to access the information. To substantiate their doubts, the Satellite Parties point to a case study prepared by Cartesian for a client in

¹⁰ See ACA Connects Aug. 29 Letter.

¹¹ See Joint Objection at 2.

the broadcast sector. The Satellite Parties do not explain the relevance of this study, but they imply that involvement in the preparation of the study may constitute Competitive Decision-Making for purposes of the Protective Order.

Merely pointing out the existence of such a study is far from sufficient to establish that any of the six Cartesian employees that filed Acknowledgments of Confidentiality are engaged in “Competitive Decision-Making”. That said, as noted above, ACA Connects is eager to obtain access to the data and begin its review of the data as expeditiously as possible, so that it can evaluate the importance of the data to its advocacy in the proceeding as well as assess the need for any additional reviewers. It is essential that ACA Connects begin this work promptly so that it has sufficient opportunity to evaluate and respond to the data before the Commission reaches any final decisions in this proceeding.

To conduct this initial evaluation, ACA Connects seeks access to the data only for one of the six Cartesian individuals, Nikos Andrikogiannopoulos. As the lead consultant advising ACA Connects in this proceeding, he is uniquely capable of contributing to this initial assessment. Moreover, his eligibility to access the data is beyond question. He previously submitted an Acknowledgment of Confidentiality attesting to the fact he is not involved in Competitive Decision-Making. To further address any lingering concerns, he has provided a sworn declaration that makes abundantly clear that he is eligible to participate in this review. In particular, per his declaration, Mr. Andrikogiannopoulos is not currently engaged in work for any Cartesian client other than ACA Connects, and his other work is not related to telecommunications or the satellite industry. With Mr. Andrikogiannopoulos’ declaration on file, there can be

no basis for denying him access to the confidential data filed in this proceeding. ACA Connects encourages the Commission to grant him such access without delay.

IV. ACA CONNECTS RENEWS ITS REQUEST THAT IT BE GRANTED SUFFICIENT ACCESS TO CONFIDENTIAL DATA FILED IN THE PROCEEDING TO COMPLETE A FULL REVIEW

The Satellite Parties assert that granting ACA Connects' outside law firm attorneys the ability to review confidential data filed in the proceeding would give ACA Connects an "adequate opportunity" to review the data, and so additional reviewers are unnecessary.¹² Their assertion is false. Though Mr. Michalopoulos and Mr. Leris are important members of ACA Connects' reviewing team, their review of CI and HCI filed in the proceeding could not substitute for the review of other members, especially since most information in question is of a technical nature and needs to be analyzed by the relevant experts. Mr. Andrikogiannopoulos, in particular, has been and continues to be instrumental in formulating and refining ACA Connects' detailed proposals for reallocation of the C-Band.¹³ He is the individual with the greatest expertise to evaluate the data and information that would be available pursuant to the Protective Order. As for Mr. Lieberman, he serves in a unique role as the individual that oversees ACA Connects' advocacy in this proceeding, including its formulation and advancement of policy proposals and legal arguments, and the undersigned assists him in carrying out these activities. Both Mr. Lieberman and the undersigned have been heavily involved in

¹² See *id.* at 3.

¹³ See Letter From Pantelis Michalopoulos, Counsel to ACA Connects, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 (July 9, 2019).

the formulation and continued refinement of ACA Connects' proposals with Mr. Andrikogiannopoulos.

ACA Connects has thus determined that Mr. Andrikogiannopoulos, Mr. Lieberman, and the undersigned must have access to CI and HCI filed in the proceeding in order to complete a full review on the association's behalf, and it has taken the necessary steps to secure access to the data for these individuals. In the absence of any reason to withhold such access, the Commission should grant it forthwith, notwithstanding the Satellite Parties' subjective opinion that a lesser degree of access would be "adequate."

V. ACA CONNECTS AND OTHER INTERESTED PARTIES ARE ENTITLED TO REVIEW ALL CONFIDENTIAL AND HIGHLY CONFIDENTIAL INFORMATION THAT HAS BEEN SUBMITTED OR PRESENTED TO COMMISSION STAFF IN THIS PROCEEDING

ACA Connects has made clear that its reviewing team seeks access to "all Confidential and Highly Confidential material that has been or may be filed" in this proceeding," including specific data referenced in CBA *ex parte* filings dated November 19, 2018, and April 3, 2019.¹⁴ In the Joint Objection, the Satellite Parties assert that the data referenced in these filings has not "been filed with the Commission" and is therefore not available for review under the Protective Order.¹⁵

¹⁴ See ACA Connects Aug. 29 Letter at 2. Members of the ACA Connects Review Time also sought access to data submitted by satellite providers to the Commission pursuant to an Order issued in July 2018. See *id*; see also *Expanding Flexible Use of the 3.7-4.2 GHz Band et al.*, GN Docket No. 18-122 et al., Order and Notice of Proposed Rulemaking, FCC 18-91 (rel. July 13, 2018).

¹⁵ See Joint Objection at 1.

What the Satellite Parties do not address is the extent to which, and in what form, this data has been “present[ed]” to Commission “decision-making personnel.”¹⁶ For instance, the November 19, 2018 filing summarizes a meeting in which CBA member companies “separately presented confidential and competitively sensitive information” to Commission staff, including the chiefs of the Wireless Telecommunications Bureau, International Bureau, Office of Engineering and Technology, and Office of Economics and Analytics.¹⁷ According to the CBA, SES and Intelsat presented the following information in the meeting:

SES and Intelsat each explained their internal plans to make up to 180 MHz available for mobile use, including regrooming traffic, adding more satellites, and ensuring high-quality satellite reception through filters and mitigation techniques. They separately presented a snapshot of the current loading of cable arc and broadcast arc satellites and explained how that loading could be adjusted and the users repacked to clear the relevant number of transponders in an 18-36 month time period, while still maintaining the high quality of service to existing video distribution customers.¹⁸

There can be no doubt that the information discussed in these “presentation[s]” is core to decisions that the Commission will be making in this proceeding, and were intended to influence the “outcome” of this proceeding in CBA’s favor by demonstrating the feasibility of CBA’s proposals for reallocating the C-Band.¹⁹ As such, any underlying information that was shared with Commission staff in the course of the presentations

¹⁶ See 47 CFR § 1.1200 et seq. (Commission rules governing *ex parte* “presentations” to “decision-making personnel” in Commission proceedings).

¹⁷ See CBA November 11, 2018 *Ex Parte* Letter 2.

¹⁸ See *id.* at 2.

¹⁹ See 47 CFR § 1.1202 (definition of “presentation” for purposes of the *ex parte* rules).

should have been properly submitted and made part of the record.²⁰ To the extent such information was not properly submitted, the Commission should direct the parties that presented this data to submit it, and to the extent it includes CI or HCI, it can and should be filed under the terms of the Protective Order. The same treatment should apply with regard to any other data that has been or may be presented to Commission decision-making personnel in a manner directed to the “merits or outcome” of this proceeding.

Making such information available for review as part of the record is critical to ensuring the integrity of this proceeding. If ACA Connects and other parties are to have a fair opportunity to assess and respond to arguments have been presented to Commission decision-making personnel in attempt to influence the outcome of this proceeding, they must have access to any underlying data included in these presentations. To deny parties access to such information would call into question the transparency of the Commission’s decision-making, and could leave the Commission’s final decisions vulnerable to legal challenge. Accordingly, the Commission must ensure that all information presented to it and upon which it will “base its determinations” in the proceeding is made part of the record and available for review, consistent with Commission rules and the terms of the Protective Order.

²⁰ See 47 CFR § 1.1206(b)(1) (“A person who makes an oral *ex parte* presentation subject to this section shall submit to the Commission's Secretary a memorandum that . . . summarizes all data presented and arguments made during the oral *ex parte* presentation.”); (b)(2) (“Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and, accordingly, must be filed consistent with the provisions of this section.”). See also 47 CFR § 0.459 (Commission rule governing the submission of materials in Commission proceedings with a request for confidential treatment).

Finally, ACA Connects notes that, on September 9, 2019, Intelsat, SES, and Telesat filed redacted versions of certain information that they had previously “submitted” to the Commission.²¹ It is not clear whether these data, while previously presented, had not been “filed” in the C-band satellite industry’s view. The CBA members should supplement these filings with any additional information presented to Commission staff.

VI. CONCLUSION

ACA Connects appreciates the opportunity to participate in this proceeding, and it encourages the Commission to act as requested herein.

Respectfully submitted,



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²¹ See, e.g., Letter from Michele Farquhar, Counsel to SES, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 et al. (Sept. 9, 2019); Letter from Kathryne Dickerson, Counsel to Intelsat, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 et al. (Sept. 9, 2019); Letter from Joseph A. Godles, Counsel to Telesat, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 18-122 et al. (Sept. 9, 2019).

APPENDIX

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DECLARATION OF ROSS J. LIEBERMAN

1. My name is Ross J. Lieberman. I serve as Senior Vice President of Government Affairs for the ACA Connects – America's Communications Association ("ACA Connects"). I have held this position since June of 2007.
2. My business address is 2415 39th Place NW, Washington, DC 20007.
3. I am licensed to practice law in the District of Columbia.
4. As Senior Vice President of Government Affairs for ACA Connects, I am the association's senior advocate on Capitol Hill and at the federal agencies, including the Federal Communications Commission. My responsibilities include assisting with the development and implementation of all legislative and regulatory efforts on matters that impact ACA Connects' general membership.
5. I report directly to ACA Connects President and CEO Matthew M. Polka, and not to the association's board of directors, nor to any of the association's general members who are MVPDs or associate members who are vendors.
6. With regard to regulatory matters, my specific duties include overseeing the day-to-day management of regulatory matters for the trade association, including the development of policy positions and the strategies for its implementation, the preparation of FCC filings, and representing the association before federal agencies and Congress.

7. I have been actively engaged in the above-referenced C-Band proceeding behalf of ACA Connects, a non-commercial party, and will continue to be the primary point person leading ACA Connects' activity in the proceeding.
8. I am not involved in giving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of any ACA Connects member or associate member company in competition with or in a business relationship with Intelsat, SES, Telesat, or the C-Band Alliance ("CBA").

I, Ross J. Lieberman, hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.

A handwritten signature in black ink, appearing to read "Ross Lieberman", written over a horizontal line.

Ross J. Lieberman
Senior Vice President of Government Affairs
ACA Connects

Executed this 12th Day of September, 2019

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DECLARATION OF BRIAN HURLEY

1. My name is Brian Hurley. I serve as Vice President of Regulatory Affairs for ACA Connects – America's Communications Association ("ACA Connects"). I have held this position since June of 2018.
2. My business address is 2415 39th Place NW, Washington, DC 20007.
3. I am licensed to practice law in the District of Columbia.
4. As Vice President of Regulatory Affairs for ACA Connects, I participate in the association's advocacy before the Federal government, with a focus on advocacy before the Federal Communications Commission ("FCC"). My responsibilities include assisting with the development and implementation of regulatory and legislative efforts on matters that impact ACA Connects' general membership.
5. I report directly to ACA Connects' Senior Vice President of Government Affairs, Ross Lieberman, and not to the association's board of directors, nor to any of the association's general members who are MVPDs or associate members who are vendors.
6. With regard to regulatory matters, my specific duties include participating in the day-to-day management of regulatory matters for the trade association, including the development of policy positions and the strategies for its implementation, the preparation of FCC filings, and representing the association before the FCC and in other forums.

7. I have been actively engaged in the above-referenced C-Band proceeding on behalf of ACA Connects, a non-commercial party, and will continue to participate in this capacity.
8. I am not involved in giving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of any ACA Connects member or associate member company in competition with or in a business relationship with Intelsat, SES, Telesat, or the C-Band Alliance ("CBA").

I, Brian Hurley, hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.



Brian Hurley
Vice President of Regulatory Affairs
ACA Connects

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DECLARATION OF NIKOS ANDRIKOIANNPOULOS

1. My name is Nikos Andrikogiannopoulos. I, via my firm, SigmoidBell, Inc ("SigmoidBell"), serve as an advisor to Cartesian, a specialist consulting firm of industry experts focused on the global telecommunications, media, and technology industries. I have held this position since July 2019.
2. My business address is 91 Sidney St., STE 1010, Cambridge, MA 02139.
3. I am the owner and sole employee of SigmoidBell, Inc., a firm that specializes in blockchain analytics. SigmoidBell does not serve any clients in the telecommunications or media sector other than Cartesian.
4. In my capacity as an advisor to Cartesian, I currently participate in Cartesian's work for one client, ACA Connects—America's Communications Association ("ACA Connects").
5. In that capacity, I have participated in and continue to participate in ACA Connects' formulation and advancement of proposals regarding reallocation of C-Band spectrum, including its proposal to transition the delivery of MVPDs' and MVPD programmers' video programming from the C-Band to an alternative platform over fiber.
6. I am not involved in any work stemming from Cartesian's development of a case study titled, "Digital Satellite Strategy for a Broadcaster."

7. I am not involved in giving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of any Cartesian or SigmoidBell client in competition with or in a business relationship with Intelsat, SES, Telesat, or the C-Band Alliance ("CBA") and will remain uninvolved for the duration Cartesian is engaged by ACA Connects. As such, my work for Cartesian and SigmoidBell is divorced from Competitive Decision-Making, as that term is defined in the Protective Order in this proceeding.

I, Nikos Andrikogiannopoulos, hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.



Nikos Andrikogiannopoulos
CEO
SigmoidBell

Executed this 11th Day of September, 2019